

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60833

FILE: B-185553

DATE: May 3, 1976

MATTER OF: A.C. Electronics, Inc.

98989

DIGEST:

1. Agency had reasonable basis for decision in November and December 1975 not to exercise available quantity option under existing multi-year contract but rather to procure required item competitively where prices lower than option prices were anticipated based on fact that awards were made under two solicitations (June 1974 (noncompetitive) and September 1975 (competitive)) at prices lower than those stated in multi-year contract option.
2. Option clause which states that Government may unilaterally exercise option(s) to increase quantities within ranges contained in contract schedule provides that Government has discretion to exercise or conversely not exercise subject only to limitations imposed by regulation. Option amounts to vested right in Government to require additional production at set price. Option clause does not guarantee exercise of option or provide specific rights to contractor.
3. Agency's actions in not exercising option under existing contract, where recent procurement actions did in fact result in prices to Government lower than option prices, achieved exactly what regulations indicate as being desirable--increased competition resulting in lower prices to Government.
4. Regulation does not provide for rejection of bid where "buy in" is suspected. Fact that bidder may incur loss at its bid price does not justify rejecting otherwise acceptable bid unless extremely low bid requires determination that low bidder is nonresponsible. However, GAO does not review protests against affirmative determination of responsibility unless either fraud is alleged on part of procuring officials or solicitation contains definitive responsibility criteria which allegedly have not been met.

B-185553

This protest concerns the issuance, by the United States Army Missile Command, of request for proposals (RFP) DAAH01-76-R-0399 on November 19, 1975, and invitation for bids (IFB) DAAH01-76-B-0272 on December 8, 1975. The subject RFP sought proposals for 568 TOW missile tripod mounts while the IFB sought bids on 299 of the same units. A.C. Electronics, Inc. (A.C.), questions the issuance of the solicitations on the basis that the agency, to fulfill its requirement for these items, should have exercised options under an existing multi-year contract (DAAH01-74-C-0544) between A.C. and the Army.

Pursuant to formal advertising procedures, the Army awarded contract -0544 to A.C. Electronics on February 12, 1974, covering multi-year requirements for the TOW tripod mount. The contract provided for fixed prices for basic and option quantities for each of the program years, subject to an escalation provision. The contract option clause provides, in pertinent part:

"The Government may unilaterally exercise an option(s) to increase the quantity of any of the hardware items provided for in the Contract Schedule by any quantity within the option quantity ranges contained in the Contract Schedule. An option may be exercised one or more times during each program year's option exercise period for any hardware item listed in the Contract Schedule, provided the total cumulative option quantity(s) exercised does not exceed the upper limit of the highest option quantity range for the respective hardware item." (Emphasis added.)

During the term of contract -0544, additional acquisitions of TOW tripod mounts have been made above the basic quantities set forth therein. A synopsis of those acquisitions is set out below:

B-185553

| <u>Date</u> | <u>Acquisition From</u> | <u>Unit Price</u> | <u>Basis</u> | <u>Reason (According to contracting officer)</u> |
|----------------|-----------------------------------|-----------------------|---|---|
| June 1974 | G. W. Galloway Company (Galloway) | \$633.42 ¹ | Sole Source award | For requirements over A.C.'s basic quantities under -0544. Galloway was already producing under another contract and A.C. had not yet passed first article testing on contract -0544. |
| May 1975 | A.C. | \$704.79 | Exercise of option under contract -0544 | Only contractual means to meet delivery schedule. |
| September 1975 | A.C. | \$589.20 ² | Competitive RFP -0130 | For requirement over A.C.'s basic quantity. Contracting officer anticipated prices lower than A.C.'s under option. |

¹If option had been exercised under contract -0544, unit price would have been \$690.89.

²Galloway's proposed price was \$618.34. The option price per unit in contract -0544 was \$615 without considering escalation.

Since in September 1975 an award was made via competitive procurement at a price lower than the option price in A.C.'s multi-year contract, when an additional requirement over and above the basic contract quantity became known to the agency in October 1975, the contracting officer, acting pursuant to Armed Services Procurement Regulation (ASPR) § 1-1505 (1975 ed.), chose not to exercise any options under A.C.'s contract, but rather issued RFP -0399 and IFB -0272. According to the contracting officer, "* * * the lower prices obtained under RFP DAAH01-76-R-0130 clearly precluded the exercise of the A.C. option to fulfill these requirements. * * *" (Emphasis added.)

ASPR § 1-1505(c) and (d) (1975 ed.) states, in pertinent part, that:

"(c) Options should be exercised only if it is determined that:

(i) funds are available;
* * * * *

(iii) the exercise of the option is the most advantageous method of fulfilling the Government's need, price, and other factors considered.

(d) Insofar as price is concerned, the determination under (c)(iii) above shall be made on the basis of one of the following.

(1) A new solicitation fails to produce a better price than that offered by the option. When the contracting officer anticipates that the option price will be the best price available, he should not use this method of testing the market but should use one of the methods in (2), (3), or (4) below (see 1-309).

(2) An informal investigation of prices, or other examination of the market, indicates clearly that a better price than that offered by the option cannot be obtained.

(3) The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable, considering such factors as market stability and a comparison of the time since award with the usual duration of contracts for such supplies and services.

(4) Established prices are readily ascertainable and clearly indicate that formal advertising or informal solicitation can obviously serve no useful purpose." (Emphasis added.)

At the time of the issuance of RFP -0399 on November 19 and IFB -0272 on December 8, 1975, the following facts subsisted: (a) the option exercised under the A.C. contract in May 1975 had resulted in the unit price of \$704.79; and (b) awards were made under two solicitations, one competitive, at unit prices less than the option prices called for in A.C.'s contract.

As the Army points out, B-173141, October 14, 1971, involved an analogous situation. There, on the basis of letters received from two prospective bidders, the contracting officer determined that it would be in the best interest of the Government to compete a requirement rather than exercise an option under an existing contract. We held:

"* * * it is our opinion that after the contracting officer received information that better prices than those in the option were available, he was precluded by ASPR 1-1505(c)(iii) from exercising the option and he had no alternative but to issue a new invitation for the requirements."

The facts presented in the instant situation provide more support for the action taken than the situation in B-173141, supra. Here, the basis for the contracting officer's determination that better prices could be obtained through competition did not come through self-serving statements of potential bidders but was based on recent procurement actions which did in fact result in prices to the Government lower than the option prices contained in contract -0544.

We, therefore, conclude that the contracting officer clearly had a reasonable basis for the decision not to exercise the options under the A.C. contract but rather to procure the required items competitively.

A.C. argues that the agency has, in effect, utilized auctioning procedures to provide the Government with a means to improperly award quantities capable of being satisfied under its contract to firms at lower prices than established under a competitively-awarded contract, i.e., contract -0544. This, A.C. alleges, "forces contractors to under cut each other in their own previously bid price at the expense of profit to be successful."

Contrary to the implications in the A.C. argument, the contract option clause, quoted above, provides only that the Government has the discretion to unilaterally exercise or conversely not exercise any option contained in the contract, subject only to any limitation imposed by regulation. Therefore, this option essentially amounts to a vested right in the Government to require additional production from A.C. at a set price subject to the escalation clause. The option clause does not guarantee the exercise of any options nor provide any specific rights to the contractor. See 36 Comp. Gen. 62, 63-64 (1956); B-166499, May 29, 1969. Thus, we believe that this argument discloses no impropriety in the Government's decision not to exercise the A.C. option. In fact, as can be seen from both the Army's present actions and its actions in the recent past, the nonexercise of A.C.'s options has achieved exactly what the regulations indicate as being desirable--increased competition resulting in lower prices to the Government.

A.C. indicates that:

"* * * the successive competing of these requirements especially in this case where the competition has basically been limited to two (2) contractors, has in our opinion put the Government in the position of encouraging either or both the contractors to reduce bid prices to the point of 'Buying In' which is a direct violation of ASPR 1-311."

A.C. alleges (a) that the price bid by Galloway on IFB -0272 of \$518.40 per unit for each of 299 units represents a reduction in unit price of 16 percent over its previous price for 678 units in September 1975 of \$618.34; and (b) that Galloway cannot maintain an adequate profit level to manufacture the 299 units at \$518.40 each.

The general principles applied by this Office with regard to allegations of "buying-in" have been stated on many occasions, most recently in EPSCO, Incorporated, B-183816, November 21, 1975, 75-2 CPD 338, citing B-175284, May 2, 1972:

"ASPR 1-311 addresses the situation where an offeror knowingly offers a price substantially below anticipated cost with the expectation of recovering the loss by an increase in price through change orders during performance or by receiving follow-on contracts

at prices high enough to recover the loss on the original 'buy in.' The act of wilfully bidding below cost is not expressly prohibited. However, when there is reason to believe that this has occurred, the contracting officer is required by that regulation to assure that the difference is not recovered in the pricing of change orders or of follow-on procurements subject to cost analyses. Further, since the regulation does not provide for rejection of a bid where a 'buy in' is suspected, we have recognized that there is no legal basis upon which an award may be precluded or disturbed merely because the low bidder submitted an unprofitable price.* * *"

Moreover, we have held that the fact that a low bidder may incur a loss at its bid price does not justify rejecting an otherwise acceptable bid. Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169; B-173088, July 22, 1971. To properly reject a bid as being extremely low would require a determination that the bidder was nonresponsible. See Futronics Industries, Inc., *supra*; Parson Curtain Products, Inc., B-185104, November 14, 1975, 75-2 CPD 311. Here, we are aware of no determination by the Army as to Galloway's responsibility. However, in the event that Galloway is found responsible, it should be noted that our Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria, which allegedly have not been met. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365 affirmed 54 Comp. Gen. 715 (1975), 75-1 CPD 138.

The suggestion is also raised by A.C. that the procedures utilized by the Government, i.e., in not purchasing under A.C.'s contract -0544, may influence the Government to possibly not fund the program requirements to be fulfilled by the basic quantities established under the contract. In this regard, we note that the suggestion is premature. In any event, the record discloses that all basic quantities called for

B-185553

in contract -0544 have been ordered as called for by the contract.

For the reasons set forth above, A.C.'s protest is denied.

R. F. K. 11m
Deputy Comptroller General
of the United States